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IN THE

Supreme Court of the United States

October Term, 1949.

In the Matter

—*of*—

R. J. STEVENS BAKING CORP.,

Bankrupt,

CREAM-O PRODUCTS CORP.,

Petitioner,

—v.—

HARRY HOFFMAN, Receiver and Trustee,

Respondent.

BRIEF OF TRUSTEE IN BANKRUPTCY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAX SCHWARTZ,
Attorney for Trustee-Respondent.

THE ALBERT PRESS — TRIANGLE 5-1038-1039

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BRIEF OF TRUSTEE IN BANKRUPTCY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioner seeks to review the unanimous decision of the Circuit Court of Appeals for the Second Circuit, 180 F. (2d) 649, affirming the order of the United States District Court for the Eastern District of New York, which affirmed the order of the Referee in Bankruptcy dated June 13, 1949 adjudging the conditional bill of sale held by Cream-O Products Corp. to be null and void.

STATEMENT.

The statement of facts by petitioner is substantially correct, except the agreement dated March 10, 1948 (67-86), referred to in the conditional bill of sale as being simultaneously executed therewith but not filed, provided among other things as follows:

(a) R. J. Stevens Baking Corp. would, on Monday of each week, pay to Cream-O 10% of its gross sales of merchandise in the processing and packing of which the machines and packing materials sold under the agreement had been used (f. 76).

(b) Such payments would be applied first against the purchase price of the packing materials, and, when the same had been paid in full, against the purchase price of the machinery (f. 77).

(c) On November 17, 1949 the balance, if less than $5,000.00, was to be paid in full; if more, the buyer, R. J. Stevens Baking Corp., was to pay $5,000.00 and execute promissory notes for the amount remaining unpaid (ff. 77-78).

No express reservation of title to the machinery on the part of Cream-O was contained in said agreement of March 10, 1948. However, the agreement states:

> "Simultaneously herewith the parties hereto are duly executing a conditional bill of sale whereby Cream-O is conditionally selling and transferring to Stevens the following machinery * * *." (f. 68.)

Then follows an itemized statement of the machines sold thereunder.

The writ should not be allowed, firstly, because there is no conflict in decisions, and secondly, because the decision of the Circuit Court requiring the filing of the entire con-

tract accords with the prior decisions in this Circuit, other circuits, and ordinary rules of law.

The alleged contra decision cited by petitioner is not in point. It will be briefly analyzed later on.

THE QUESTION INVOLVED.

The issue presented to and determined by the Referee in Bankruptcy, the District Court, and the Circuit Court of Appeals, was: Is the conditional bill of sale null and void as against the trustee for failure to comply with Section 65 of the Personal Property Law requiring the filing of the contract or a copy thereof, where the conditional bill of sale is alone recorded, and refers to a contemporaneously executed written agreement, which was never filed, by which the parties specify the purchase price of the machines and the dates and manner of payment therefor?

POINT I.

THE CONDITIONAL BILL OF SALE IS NULL AND VOID AS AGAINST THE TRUSTEE.

The Referee, the District Court, and the Circuit Court of Appeals have all held that the conditional bill of sale is null and void as against the trustee on the ground that Section 65 of the Personal Property Law of the State of New York requires the filing of the contract or a copy thereof. Here all that was filed was a conditional bill of sale, which stated:

> "Title to the said machines and machinery shall remain in the vendor until the full purchase price therefor has been paid by the vendee in accordance with an agreement being entered into simultaneously herewith between the parties hereto." (f. 56.)

The contemporaneously executed written agreement of March 10, 1948, by which the parties specified the purchase

price of the machines and the time and manner of payment thereof, was never filed for record. Because of such failure, the Referee and the District Court held the conditional bill of sale to be null and void as against the trustee. This decision was affirmed by the Circuit Court of Appeals on the authority of *Empire State Chair Co., Inc.* v. *Beldock* (C. C. A. 2), 140 F. (2d) 587, cert. den. 320 U. S. 760.

It is submitted the Circuit Court properly and correctly held that the petitioner failed to distinguish the present case from the *Beldock* case, and that the failure to file so substantial a part of the contract as gives notice of the price and terms of the payment is a fatal defect.

POINT II.

THE DECISION OF THE CIRCUIT COURT IS NEITHER OPPOSED TO THE DECISIONS OF THE SEVENTH CIRCUIT OR ANY OTHER CIRCUIT, NOR TO THE PROVISIONS OF THE UNIFORM CONDITIONAL SALES ACT.

The Uniform Conditional Sales Act (New York Personal Property Law, Section 65), requires the filing of the contract or a copy thereof. Here the contract was made up in two parts: the instrument designating the conditional sales contract, and the simultaneously executed collateral agreement. Together they formed one contract. Only the instrument designated the conditional sales contract was filed. The collateral agreement was never filed. The Circuit Court of Appeals properly held there was no compliance with the statute.

This decision is in accord with the decisions in:

Salkin v. *Dubois* (C. C. A. 3), aff'g *In re Mineral-Lac Paint Co.* (D. C. Pa.), 17 F. Supp. 1, and *In re Smith* (D. C. Pa.), 19 F. Supp. 597;

Midwest Production Co. v. *Doerner* (C. C. A. 10), 70 F. (2d) 194;

In re Ford-Rennie Leather Co. (D. C. Del.), 2 F. (2d) 750;

Meier & Frank Co. v. *Sabin* (C. C. A. 9), 214 F. 231;

In re Martina (W. D. N. Y.), 39 F. Supp. 255;

In re Youngs Cornell Utilities Co. (E. D. N. Y.), 20 F. Supp. 381.

In re Jaeger, 284 F. 130, aff'd 284 F. 136, is not to the contrary. The facts in *In re Jaeger* are not applicable. The decision of the Court was based upon the particular wording of the state statute and the facts in the case. The Court held, at page 133, that:

> "* * * the price lists were not part of the contract, but were merely evidence tending to prove what the regular wholesale price was. * * * Being merely evidence, and not part of the contract, it follows that there was no necessity for filing such lists."

This is directly contrary to the situation in the case at bar, wherein the terms with respect to price and time and manner of payment, and the conditions with respect to reservation of title, were the essence of the terms of the collateral agreement which was never filed, and which the Referee, the District Court, and the Circuit Court of Appeals all held to be an essential part of the contract and constituted an indivisible part of the entire contract between the parties.

In re Jaeger, (*supra*), has never been cited nor relied upon by any other court upon the question involved herein, although the decision was rendered long prior to the cases cited herein.

There is no conflict in the interpretation of the Uniform Sales Act. The general rule is, as interpreted by the Court below and in *Empire State Chair Co., Inc.* v. *Beldock* (*supra*), and the cases cited therein.

In re Jaeger (*supra*), was decided upon peculiar facts in the case. If it is urged that it represents an interpretation of the Uniform Sales Act, the decision stands by itself, and in a distinct minority. But, in fact, there is no conflict and there is no question presented of any significant importance requiring the consideration of this Court. The decision of the Circuit Court of Appeals is in conformity not alone with the decisions of the courts of the State of New York, but with the decisions of the courts in other circuits, District Courts, and state courts.

To hold that what is one of the most important factors of a conditional sales agreement—the terms and conditions with respect to the reservation of title, to wit: the price, time and manner of payment, is not required to be made a matter of record—would be to emasculate the statute and defeat the very purpose of the provision requiring the filing of the entire contract.

The intent of the Uniform Conditional Sales Act, and the holdings of the various federal and state decisions, have all been to the effect that the failure to record a part of the agreement is a fatal defect.

CONCLUSION.

THERE BEING NO CONFLICT IN THE DECISIONS AND THERE BEING NO IMPORTANT QUESTION OF LAW INVOLVED, THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MAX SCHWARTZ,
Attorney for Trustee-Respondent.